IBRARY
ME COURT. U. S.

FILED
NOV 2 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

ARNOLD B. ELKIND
Attorney for Petitioners
122 East 42nd Street
New York, N. Y. 10017

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Statute Involved 2

Question Presented 5

Statement of the Case 5

ARGUMENT

POINT I—

Congress did not intend to discriminate against the operating sector of the railroad industry 8

POINT II—

Eleventh (c) was designed to serve a pragmatic purpose and must be interpreted pragmatically 12

CONCLUSION 16

Proof of Service 17

CASES

Brotherhood of Sleeping Car Porters v. Thompson, 367 F.2d 489 (4th Cir.) 6

Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40 10

International Association of Machinists v. Street, 367 U.S. 739, 760, 764 (1951) 9

PAGE

Local 1976, Carpenters Union v. Labor Board, 357 U.S. 93, 99, 100 11

National Woodworkers Association v. Labor Board, 368 U.S. 612 11

N.L.R.B. v. Allis Chalmers Manufacturing Co., Inc., 388 U.S. 175 11

Pennsylvania R. Co. v. Rychlik, 352 U.S. 480, 492 to 494 6

Rohrer v. Conemaugh & Black Lick R.R. Co., 359 F.2d 127 (1966) 6

Steele v. L. & N. R.R. Co., 323 U.S. 192 6

Turnstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 6

OTHER AUTHORITIES CITED

Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295 10

Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789 10

Railway Labor Act, Eleventh, Section 2 (45 U.S.C. 152, Eleventh; Jan. 10, 1951, c. 1220, 64 Stat. 1238) 2, 5, 6, 7, 10, 14, 15, 16

Report No. 2262, 81st Cong., 2nd Sess. 10

Report No. 2811, 81st Cong., 2nd Sess. 10

PAGE

Thirty-Second Ann. Rept. of the National Mediation Board (1966), p. 45, ... 15

28 U.S.C. 1254 2

29 U.S.C. 151, 158(a)(3), 159(a) 10

45 U.S.C. 151(a) (1), (4), (5) 10

145 U.S.C. 153 First (h) First Division 13

96 Congressional Record 15736, 16261, 16268, 16328, 17055 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

Opinions Below

On April 27, 1967, the Petitioners were temporarily enjoined by the United States District Court for the Southern District of New York (Herlands, J.) from enforcing the terms of a union security agreement entered into between the Petitioners and the Erie Lackawanna Railroad (268 F.Supp. 397) (29a).

The United States District Court for the Southern District of New York granted Respondents' motions for summary judgment, denied Petitioners' cross-motions for summary judgment, and entered judgment for Respondents on Petitioners' counterclaim. The opinion of Judge Palmieri is dated July 25, 1967 (23a), and judgment was entered thereon in the office of the Clerk of the United States District Court for the Southern District of New York on the 29th day of August, 1967 (20a).

On March 5, 1968 the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court (391 F.2d 156) (4a).

The Supreme Court granted Petitioners' Writ of Certiorari on October 14, 1968.

Jurisdiction

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. 1254.

Statute Involved

Section 2, Eleventh of the Railway Labor Act (45 U.S.C. 152, Eleventh; Jan. 10, 1951, c. 1220, 64 Stat. 1238) reads as follows:

"Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any indi-

vidual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of

the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."

Question Presented

1. Whether train service employees may be required by a labor-management agreement to financially support a collective bargaining agent bearing the exclusive duty to represent said employees in all prospective crafts of train service?

Petitioners assert that the answer should be in the affirmative.

Statement of the Case

Representing, for all practical purposes, all train service employees of the Erie Lackawanna Railroad, the Petitioners negotiated and executed agreements with the Erie Lackawanna Railroad which, pursuant to Section 2, Eleventh (a) (45 U.S.C. 152 Eleventh (a)) of the Railway Labor Act, required employees to become members of the Brotherhood of Railroad Trainmen (hereinafter referred to as the

"Brotherhood"). While all statutory safeguards mandated in order to prevent discrimination were included in the union security agreements, the parties omitted to include a provision which would give the option to employees to satisfy their union shop obligation by paying dues to any other union.

The omission was based on the teaching of this Court in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 492 to 494, which gave the rationale for permitting alternative union shop membership to operating railroad employees, and the decision of the United States Court of Appeals for the Third Circuit, through which the railroad operates, in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (1966).

The dicta in the *Rychlik* case and the holding in the *Rohrer* case were to the effect that the sole purpose of subdivision (c) of Section 2, Eleventh of the Railway Labor Act[1] was to prevent the imposition of compulsory dual unionism on operating employees who are traditionally exposed to seasonal intercraft transfers. Since, as in the *Rohrer* case, it was manifest that none of the employees could be involved in transfers, from the jurisdiction of the Brotherhood, the legislative *raison d'etre* for the inclusion of the subdivision (c) license was absent. The parties therefore omitted to furnish a contractual license to support a stranger to collective bargaining on the Erie Lackawanna Railroad in lieu of the agent charged with obligations to bargain on behalf of all the employees. (*Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192; *Turnstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Brotherhood of Sleeping Car Porters* v. *Thompson*, 367 F.2d 489 [4th Cir.]).

---

[1] 45 U.S.C. 152, Eleventh (c).

The Respondents are employees of the Erie Lackawanna Railroad who successfully insisted below that subdivision (c) of Section 2, Eleventh conferred upon them a right to satisfy their union shop obligation by paying dues to a rival organization which did not represent any Erie Lackawanna employees. They successfully insisted that any union security agreement must spell out *in haec verba* the alleged right not to belong to or support the union which renders them service as collective bargaining agent.

Some of the Respondents are paying dues to an organization known as the Switchmen's Union of North America, AFL-CIO (hereinafter referred to as "SUNA"). Some of the Respondents are paying dues to an organization known as the Order of Railway Conductors & Brakemen (hereinafter referred to as "ORC&B"). Both of these are recognized labor organizations, national in scope, and organized in accordance with the Railway Labor Act.

Neither SUNA nor the ORC&B have at any time material to these proceedings been certified by the National Mediation Board as the bargaining representative of any employees of any class or craft on the Erie Lackawanna Railroad [90a].

Neither of these unions have at any time material to this proceeding been recognized by the Railroad as the exclusive bargaining agent for any employees of any craft or class performing services on the Erie Lackawanna Railroad [91a].

Neither of these unions have at any time material to these proceedings been a party to any collective bargaining agreement with the Erie Lackawanna Railroad [91a].

None of the Respondents contribute in any way to meeting the expense of maintaining the collective bargaining agent on the property [92a].

None of the Respondents hold employment rights with the Railroad in any craft or class other than those classifications which are exclusively represented on the Railroad by the Petitioners [92a].

ARGUMENT

POINT I

Congress did not intend to discriminate against the operating sector of the railroad industry.

The holding below institutionalizes competitive unionism in the operating sector of the railroad industry. It confers on dissident Trainmen an alternative not available to most other employees in the railroad industry,[2] and unavailable under the terms of union shop agreements in American industry generally [205a]. That alternative is to express their dissent by withholding economic support of their collective bargaining agent and instead financially supporting an absentee rival organization. The disadvantages flowing from such an interpretation may be summarized as follows [181a-185a, 220a-250a].

From the Standpoint of the Employee.

The union dues of most employees must be higher to compensate for the loss of dues paid to outside unions. If an employee is dissatisfied with union leadership his chances of changing that leadership are diminished by the circumstance that dissenters may belong to the rival organization. If he pays dues to the rival organization he is out of contact with his collective bargaining representative. From time to time, when there is a representa-

[2] Only train, engine, yard and hostling service employees have the alternative union shop license. (4, *supra.*)

tional election in which an attempt is made by the rival organization to take over the contracts, the employees are indirectly subjected to the extraordinary expense of public relations campaigns and inter-union combat.

From the Standpoint of the Union With the Collective Bargaining Agreement.

The union is compelled to perform services, without discrimination, without the financial support of those who are most critical of its efforts. The funds that are siphoned off are used to finance and organize the dissent to its efforts. (Cf. *International Association of Machinists* v. *Street*, 367 U.S. 739, 760, 764 [1951]).

From the Standpoint of the Carrier.

Competitive unionism imposes upon the Carrier a confrontation with a multitude of grievances and penalty claims which may be totally lacking in merit. Since employees allege a right to have their grievances presented by anyone of their choice, the grievance procedures become a kind of coliseum for the projection of extravagant grievance claims by the "switch shanty lawyers" who compete for union loyalty on the property.

Should an employee violate a union-management agreement or rule, no matter how blatant or outrageous the violation might be, the certified union is handicapped in any effort to impose discipline or otherwise cooperate with management in order to compel employees to carry out the terms of the agreement. In the event of union discipline, the employee would simply resign from the certified union and join the rival union.

From the Standpoint of the Public.

The primary purpose of the Railway Labor Act is to serve the public by minimizing the opportunities for work

stoppages in this critically necessary industry (45 U.S.C. 151(a) (1), (4), (5); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40). A strong minority enclave, without legal obligation, but with organization and finance, provides the perfect machinery for organizing illegal work stoppages, sick strikes, slowdowns, and similar acts of economic warfare.

There may be some countervailing virtues to competitive unionism under certain circumstances, but they were never mentioned or considered by Congress in the legislative history of Eleventh (c) (45 U.S.C. 152, Eleventh (c)). The legislative history of the Railroad Union Shop provision is reported as follows: Report No. 2262, 81st Cong., 2nd Sess.; Report No. 2811, 81st Cong., 2nd Sess.; Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789; 96 Congressional Record 15736, 16261, 16268, 16328, 17055 [198a-204a, 210a-219a].

Nowhere in that legislative history can there be found any evidence of an intention to perpetuate inter-union strife as a solution to the practical problem of seasonal intercraft transfers. Union shops had been found salutary instruments of national labor policy (29 U.S.C. 151, 158(a)(3), 159(a)). The railroad industry did not enjoy the benefits of the union shop [203a]. The Congressional effort was to rectify this inequity and provide a remedy whereby the railroad industry could bring itself on an equal footing with other industries in the matter of industrial organization so that they could negotiate union shops. The virtues, if any, of preserving competitive unionism were certainly never considered by Congress,

and the Respondents are challenged to direct the Court to a single question or answer or comment which would suggest that such an important deviation from a coherent and orderly national labor policy was ever considered by Congressmen, Senators, or even a witness. The Courts should expect to find some basis for incorporating an interpretation which is at war with the concept of a coherent national labor policy. (See *National Woodworkers Association* v. *Labor Board,* 368 U.S. 612; *Local 1976, Carpenters Union* v. *Labor Board,* 357 U.S. 93, 99, 100; *N.L.R.B.* v. *Allis Chalmers Manufacturing Co., Inc.,* 388 U.S. 175.)

Instead, one finds the Courts below gratuitously giving particularly discriminatory treatment to the most critical sector of the vital transportation industry.

Petitioners seek to interpret the alternative union shop license restrictively so that it would service the particular situation for which it was designed and no more.

The Courts below, however, have legislated competitive unionism into an institution even though there is no evidence that the Congress considered the virtues or vices of such an unusual policy.

POINT II

Eleventh (c) was designed to serve a pragmatic purpose and must be interpreted pragmatically.

Although union shop agreements have been authorized since 1951, there has never been any proposal for a *national* agreement on this subject by any operating union.

There are five unions representing the crafts of services involved in operating railroading. These are: the Brotherhood of Railroad Trainmen (BRT), the Switchmen's Union of North America (SUNA), the Order of Railway Conductors and Brakemen (ORC&B), the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.&E.) and the Brotherhood of Locomotive Engineers (B.L.E.).

The operating services in railroading are subdivided into train service and engine service. The crafts in train service are the Conductors, Brakemen and men performing operating services in the yards. The crafts in engine service are the Engineers and the Firemen.

There is no central hiring hall in railroading, nor typically are there floaters from railroad to railroad. A man's seniority dates from the date when he is employed in his craft by the railroad for which he performs services. Men usually stay with their hiring railroad until their death or retirement.

Seniority rights exist entirely independent of union membership.

In train service an employee may hire on as a Brakeman and eventually he may qualify as a Conductor. His seniority with his employer as a Brakeman dates from his employment as a Brakeman, and his seniority with his em-

ployer as a Conductor is dated from the first day that he worked as a Conductor. The rate of pay for Conductors is higher than the rate of pay for Brakemen, and sometimes an employee's seniority as a Conductor will permit him to work as a Conductor. When his seniority as a Conductor does not permit him to obtain attractive employment as a Conductor he may then revert to working in the original craft in which he was hired, to wit: a Brakeman, and select the position to which his higher seniority as a Brakeman entitles him.

The Brotherhood of Railroad Trainmen, the largest of the operating train unions, traditionally represents employees in all classes of train service, that is, the Conductors, the Brakemen, and the yard employees. On the Erie Lackawanna Railroad, in particular, the Brotherhood of Railroad Trainmen was the exclusive bargaining agent for all train service employees. On some railroads in the United States, however, the Brotherhood of Railroad Trainmen does not represent all train service employees. On some railroads the SUNA represents certain yard employees. On some railroads the ORC&B represents the Conductors.

The operating unions are entitled to have 5 representatives on the ultimate tribunal for the disposition of minor disputes in the railroad industry (145 U.S.C. 153 First (h) First Division).

Every labor-management contract, however, is executed by an individual railroad, as employer, and a particular collective bargaining agent. There never has been national bargaining over union security issues.

When, in 1950 and 1951, the amendment to the Railway Labor Act authorizing union shop agreements was up for legislative consideration the language of Eleventh (c) was drafted for one purpose and one purpose only. That

simple, pragmatic purpose was to permit, unhindered, the advantages that would flow both to the railroad and to the employees in allowing employees to work as both Firemen and Engineers from time to time and as Conductors and Brakemen from time to time. This is the pragmatic peculiarity referred to as intercraft mobility, and the problem was to find a method of making intercraft transfers compatible with the union shop. Eleventh (c) had no other purpose.

If a man wished to belong to two unions that, of course, would be alright, but the purpose was to prevent *compulsory* dual unionism.

The language finally selected to solve that problem has a built-in ambiguity. Were the draftsmen thinking in the specific terms of the collective bargaining practices in the railroad industry? Petitioners urge that they were. They knew that *a railroad* employs its employees to render service over an extended period of time, usually until their retirement; they knew that the overwhelming proportion of the rules governing working conditions are hammered out with *the individual railroad* as the bargaining agent. If the draftsmen were thinking in terms of these realities then the language selected means that an operating employee may satisfy his union shop requirement by maintaining membership in any of the operating unions that could represent him or could render him collective bargaining services, either in the craft in which he was hired or any craft to which he might be promoted *on the railroad.* This would mean that the union which he sought to make the beneficiary of his dues would have a viable collective bargaining presence with his employer and would be in a position to potentially render him service.

The vast preponderance of collective bargaining activities in this country are carried out by an intricate complex of local and general committees bargaining on a man to man basis with individual railroads (Thirty-second Ann. Rept. of the National Mediation Board (1966), p. 45).

The interpretation that was placed upon Eleventh (c) by the Courts below has a rationale predicated on a view of operating railroad labor as being composed of five monolithic structures, each of which perform substantial services in collective bargaining for all of the employees in the crafts or classes which they traditionally represent on a continuing basis. But this predicate has little, if any, relationship to the real collective bargaining that is carried on in the railroad industry in terms of man hours of effort, or number of agreements concluded. Collective bargaining in the railroad industry is largely non-national and each individual railroad is, in fact, the traditional collective bargaining unit in railroading. There are no national union shop agreements in the railroad industry.

The frame of reference appropriate to an understanding of the literal authority of Section Eleventh (c) is not the nation, but the locus where the agreements are made, to wit: the unit made up of the hiring railroad and the collective bargaining agent.

It follows that the manifest desire of Congress and the unions to authorize a union shop agreement for the operating sector of the railroad industry to the fullest extent possible, without doing violence to the counter interest of avoiding compulsory dual unionism, can be accomplished without substituting national competitive unionism for the union shop and without creating *ad hoc* problems for the courts.

When a union has no collective bargaining presence or status on a particular railroad, Congress did not intend that the employee could join such a union and thereby satisfy his union shop requirement. The language used by Congress in Eleventh (c) assumes that the alternative union would be a collective bargaining entity on the particular railroad where bargaining for union security would be taking place.

In this particular case, it is a fact that the BRT represented all crafts of train service on the Erie Lackawanna Railroad. Whether the employee chooses to work as a Switchtender, a Conductor or a Brakeman the BRT is the duly authorized collective bargaining agent on his behalf. Conversely, no other union could negotiate any agreement with the Erie Lackawanna Railroad that would enure to his benefit or which would apply to him. Under these circumstances, a contract requiring train service employees to maintain membership in the Brotherhood of Railroad Trainmen as a condition to continued employment was not illegal.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to the District Court. The injunction and declaratory judgment should be vacated and the complaint dismissed.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Petitioners
122 East 42nd Street
New York, N. Y. 10017

Proof of Service

I, ARNOLD B. ELKIND, Attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Petitioners' Brief on Lee Leibik and Ruth Weyand, Attorneys for Respondents, by mailing said copies, via Air Mail, postage pre-paid, addressed to their office at 343 South Dearborn Street, Chicago, Illinois 60604.

Dated this 25th day of November, 1968.

ARNOLD B. ELKIND